UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
ATLANTA BRANCH OFFICE

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL UNION NO. 657 (TEXIA PRODUCTIONS, INC.)

and **CASE 16–CB–6348**

VICTOR DE LA FUENTE, AN INDIVIDUAL

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for the General Counsel
Ricardo E. Calderon, Esq.,
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BENCH DECISION AND CERTIFICATION

Statement of the Case

KELTNER W. LOCKE, Administrative Law Judge: I heard this case on January 14 and 15, 2004 in San Antonio, Texas. On January 20, 2004, counsel presented oral argument, and on January 21, 2004, I issued a bench decision pursuant to Section 102.35(a)(1) of the Board's Rules and Regulations, and closed the hearing.

In accordance with Section 102.45 of the Rules and Regulations, I certify the accuracy of, and attach hereto as "Appendix A," the portion of the transcript containing this decision.[1] The Conclusions of Law, Remedy, Order and Notice provisions are set forth below.

Respondent's Post–Hearing Motion To Reopen the Record

On February 2, 2004, Respondent filed a "Motion of Respondent to Reopen the Record for the Purpose of Taking Previously Unavailable and/or Recently Discovered Evidence." To

[1] The bench decision appears in uncorrected form at pages 608 through 630 of the transcript. The final version, after correction of oral and transcriptional errors, is attached as Appendix A to this Certification.

this motion, Respondent appended certain documents it seeks to introduce into evidence. Respondent's motion stated, in pertinent part, as follows:

> I.
>
> Respondent represents and will prove [at] the time of a reopened hearing the following through Respondent's office secretary Esmeralda Ross that she in November of last year "lost" certain files contained in her computer. A computer expert was hired to find and retrieve those files and did so on November 19, 2003.
>
> On January 22, 2004 Ross was preparing her 2004 files and in doing so located certain of these retrieved files. She could not open them because they were not in Microsoft Word format. When she changed the format, she was able to open and discover a number of files including those containing the documents attached to this motion.
>
> The first document headed Rules of Conduct for the Motion Picture Industry reflect[s] that such rules were made effective Monday, February 27, 1995 and that such had the informal blessing of the Executive Board which intended to formally adopt them at its next meeting.
>
> Article I of the Rules specifies that in order to be in the craft members must have worked twenty–four (24) months in the craft as of February 27, 1995. Charging Party De La Fuente did not, at that time, meet this criteria and there is no indication in the rules that De La Fuente was granted any exception under these rules.
>
> The second set of documents attached are rosters of craft members working on various films at the time the rules were adopted. De La Fuente is not indicated as working [as] a craft member or considered as a craft member.
>
> II.
>
> The foregoing facts bear upon and are contradictory to certain fact findings made in the Administrative Law Judge's Bench Decision. Accordingly, the facts set forth above are pertinent and relevant and may warrant a different result, either upon reconsideration by the Administrative Law Judge or on appeal.
>
> WHEREFORE, Respondent, Teamsters Local 657, prays that its motion to reopen the record as specified above be granted.

On February 4, 2004, the General Counsel filed an Opposition to the Respondent's motion. On February 9, 2004, the Charging Party filed an Opposition. In arguing that the motion be denied, both the General Counsel and the Charging Party cite *Fitel/Lucent Technologies, Inc.*, 325 NLRB 46 (1998). In that case, the Board summarized both the definition of "newly discovered evidence" and the standard which must be satisfied to warrant reopening of the record:

> "Newly discovered evidence is evidence which was in existence at the time of the hearing, and of which the movant was excusably ignorant. A motion seeking to introduce evidence as newly discovered must also show facts from which it can be determined that

> the movant acted with reasonable diligence to uncover and introduce the evidence." *Owen Lee Floor Service, Inc.*, 250 NLRB 651 fn. 2 (1980). To prevail on its motion, Respondent must show that it acted with the diligence required to establish that it was excusably ignorant of the existence of the report that was at all times in its sole possession and control.

325 NLRB 46, footnote 1. To meet these criteria, Respondent must show all of the following: (1) the records existed at the time of the hearing, (2) it was excusably ignorant of the existence of these documents, and (3) that it acted with reasonable diligence to uncover and introduce the evidence.

Respondent has satisfied the first criterion. The records it seeks to introduce existed at the time of the hearing.

For several reasons, I conclude that Respondent has not carried its burden of proving either that it was excusably ignorant of the existence of these documents or that it acted with reasonable diligence to uncover and introduce this evidence.

Initially, it may be observed that Respondent did not support its motion with an affidavit. A movant's conclusory assertion that it was reasonably diligent does not, standing alone, satisfy the Board's test. ***Fitel/Lucent Technologies, Inc***., above.

Moreover, even assuming that Respondent had proven all the representations in its motion, those facts do not point towards a conclusion that it was reasonably diligent, but rather in the opposite direction. It is somewhat of a stretch to conclude that Respondent could be ignorant, either reasonably or otherwise, of documents which its own staff had authored.

Absent evidence that a particular person suffered from a mental defect impairing memory, I would be quite reluctant to believe that this person was unaware of his own past actions. Similarly, I would hesitate before concluding that an organization, such as Respondent, had no institutional memory of the actions taken by its own officials.

Respondent does suggest that as an organization, it did suffer from a condition which impaired its institutional memory, namely, a computer failure. However, Respondent's motion does not specifically state that its staff had failed to back up the computer's hard drive. Moreover, Respondent does not discuss whether or not it possessed hard copies of the documents in question.

It would seem quite likely that Respondent would make multiple paper copies of the documents in question, or at least some of them. For example, Respondent seeks to introduce a document captioned "RULES OF CONDUCT FOR THE MOTION PICTURE INDUSTRY." When an organization promulgates a rule, it ordinarily distributes or posts a written copy of it, both to inform affected individuals of the rule and also because publishing the rule in writing has a psychological effect, impressing upon the reader the rule's seriousness, authority and permanence.

Moreover, the record shows that Respondent did keep written records of its actions, including minutes of its executive board and general membership meetings. Indeed, Respondent itself introduced more than two dozen records documenting its actions as an organization. Therefore, I cannot simply assume that Respondent failed to keep hard copies of the records it seeks to introduce belatedly.

More fundamentally, Respondent's own motion indicates that it had repaired the computer problem and retrieved the "lost" files well before the hearing opened. Specifically, Respondent's motion represents that "A computer expert was hired to find and retrieve those files and did so on November 19, 2003." In other words, Respondent had the "unavailable" files in its possession nearly two months before hearing.

Respondent's motion implies, but does not specifically state, that even though the files had been retrieved from the computer on November 19, 2003, Respondent's officials were unaware of their existence until its secretarial employee came across them while doing other work on January 22, 2004. If Respondent is, in fact, arguing that its officers knew nothing of the documents until the secretary discovered them, such an assertion is incredible on its face.

Respondent's current president, Frank Perkins, gave extensive testimony at the hearing. Perkins was a Union official at all times material to this proceeding. Indeed, he became secretary/treasurer of the Union in 1995. It is difficult to believe that the Union official charged with responsibility for maintaining the organization's records – the secretary/treasurer – would be unaware that these documents existed. At the very least, I conclude that Respondent has failed to carry its burden of showing that its officials were excusably ignorant that such documents existed.

Further, Respondent has failed to carry its burden of showing that it acted with reasonable diligence to uncover and introduce these documents. The computer expert retrieved the files on November 19, 2003 and the hearing in this matter did not begin until January 14, 2004. Respondent had ample time to search its records to find relevant documents. For these reasons, I deny Respondent' motion to reopen the record.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act, including posting the notice to employees attached hereto as Appendix B.

In ***Teamsters, Local Union 104 (Lakeside Productions Co. d/b/a Blue Rodeo),*** 325 NLRB No. 121 (April 29, 1998), the respondent operated an exclusive hiring hall which provided drivers to television production companies. Thus, the circumstances of employment were similar to those in the present case, in which Respondent provides drivers to motion picture

production companies. In view of such circumstances, the Board concluded that posting of the notice at the union hall would not be adequate to remedy the violation:

> [I]n view of the nature of the industry involved in this case, and the itinerant and sporadic working conditions of the affected employees, we shall order the Respondent to mail copies of the attached notice to its members and to other persons who have registered on the Drivers/Wranglers referral list at any time since March 28, 1996, the first date of the occurrence of unfair labor practices.

325 NLRB No. 121, slip op. at 5.

Arguably, a similar remedy would be appropriate in the present case. However, I believe that a posting alone is sufficient here, and that requiring the Respondent to mail copies of the notice is not necessary.

The ***Teamsters Local Union*** *104* case involved a number of unlawful practices which affected a substantial number of individuals who used the hiring hall. These violations included, among others, requiring applicants to pay dues and fees even in the absence of a valid union–security agreement, requiring applicants to join the union before they were allowed to register, and closing the referral list to applicants who had not obtained approval by a majority vote of craft members. Such unlawful requirements had a direct adverse impact on the Section 7 rights of everyone who sought to use, the hiring hall.

However, the violation in the present case had an immediate impact only on the Charging Party. Certainly, the unfair labor practice could discourage others from speaking out, as the Charging Party did, at Union meetings. However, a notice posted at the Union hall would appear sufficient to inform them of the Board's action in this case. Therefore, I believe that imposing on Respondent the additional burden of mailing the notice would be unwarranted.

The remedy, of course, involves more than posting a notice. Respondent also must undo the economic harm which the Charging Party sustained because of Respondent's failure and refusal to refer him to jobs. Therefore, I recommend that the Board order Respondent to make Victor De La Fuente whole, with interest, for any loss of earnings and other benefits he suffered as a result of Respondent's discriminatory refusal to refer him for employment.

The General Counsel has not specifically sought an order requiring Respondent to restore the Charging Party's name to the motion picture craft list. However, I believe that such an order is necessary to provide a full remedy.

In fashioning a remedy, the Board seeks to restore the *status quo ante*, to place a discriminatee in the same circumstances which existed before the unlawful action against him. In ascertaining the *status quo ante*, I rely on the testimony of Archie Carrillo. Based on my observations of the witnesses, I conclude that his testimony is reliable and I credit it.

Carrillo testified that on April 8, 2001, he had a conversation with Respondent's president, Frank Perkins. Carrillo asked Perkins to place his name on the motion picture craft

referral list, which Carrillo sometimes called the "A List." Carrillo told Perkins that he, Carrillo, had worked on movie productions since 1976. Carrillo further testified as follows:

> Q Well, what did Mr. Perkins respond to you, sir?
> A Mr. Perkins? His reply to me was that the movie craft list had been closed, I think, [since] January '97, and that Mr. Victor De La Fuente was the last person to be added to the A list.

Carrillo's testimony therefore indicates that as of April 2001, the Charging Party's name was included on the Respondent's motion picture craft referral list. This testimony is consistent with that given by Respondent's former president, Richard Glasebrook, whom I credited.

Glasebrook became Union president in the 1994 election that ousted the Charging Party from his position as Union secretary/treasurer. Because of the change in Union leadership, the Charging Party also lost his appointed position of business agent. Glasebrook testified that he added the Charging Party's name to the motion picture craft referral list to "extend an olive branch" and try to "heal the wounds of the election."

After adding the Charging Party's name, Glasebrook announced that the list was closed. Glasebrook's description of events accords substantially with the explanation that Union President Perkins gave when he denied Carrillo's request: The motion picture craft referral list was closed and De La Fuente was the last person added to the list.

Based on this credible evidence, I find that the Charging Party's name was included on Respondent's motion picture craft referral list until Respondent unlawfully removed it on about December 18, 2002.

Respondent argues that De La Fuente's name should never have been included on the list because he did not have the necessary experience. Additionally, Respondent questions the authority of former President Glasebrook to add De La Fuente's name to the list on his own volition, without some action by Respondent's governing body. If the former Union president acted beyond his authority, De La Fuente's inclusion on the list arguably was void *ab initio*.

However, Respondent did not remove the Charging Party's name from the list simply to cure some previous mistake. Rather, I have concluded that unlawful animus motivated this decision. Respondent has not shown that but for the Charging Party's protected activity, it would have taken the same action, and the record would not support such a finding.

Because Respondent's unlawful action resulted in the removal of the Charging Party's name from the list, the remedy for this unfair labor practice should include restoration of his name to the list.

CONCLUSIONS OF LAW

1. At all material times, Texia Productions, Inc., has been an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

2. The Respondent, International Brotherhood of Teamsters, Local Union No. 657, is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent violated Section 8(b)(1)(A) and Section 8(b)(2) of the Act by removing Victor De La Fuente from Respondent's motion picture craft referral list on about December 18, 2002 and thereafter failing to register or refer him, because he engaged in dissident intraunion activities protected by the Act.

4. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

5. Respondent did not violate the Act in any other manner alleged in the Complaint.

On the findings of fact and conclusions of law herein, and on the entire record in this case, I issue the following recommended[2]

ORDER

The Respondent, International Brotherhood of Teamsters, Local Union No. 657, its officers, agents, successors, and assigns, shall

1. Cease and desist from:

(a) Removing any job applicant from its craft referral lists and refusing to register or refer the applicant to employers because the applicant criticized the manner in which incumbent union officers performed their jobs, or because the applicant engaged in other dissident intraunion activities protected by the National Labor Relations Act.

(b) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

(c) In any like or related manner, causing an employer to discriminate against an employee in violation of Section 8(a)(3) of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Restore Victor De La Fuente's name to the motion picture craft referral list.

(b) Make Victor De La Fuente whole, with interest, for all losses of wages and benefits which he suffered because of Respondent's unlawful conduct.

[2] If no exceptions are filed as provided by Section 102.46 of the Board's Rules and Regulations, these findings, conclusions, and recommended Order shall, as provided in Section 102.48 of the Rules, be adopted by the Board, and all objections to them shall be deemed waived for all purposes.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all referral records and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its offices in San Antonio, Texas, and at all other places where notices customarily are posted, copies of the attached notice marked "Appendix B."[3] Copies of the notice, on forms provided by the Regional Director for Region 16, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees customarily are posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

Dated Washington, D.C.

Keltner W. Locke
Administrative Law Judge

[3] If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "**POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD"** shall read, **"POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."**

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This decision is issued pursuant to Section 102.35(a)(10) and Section 102.45 of the Board's Rules and Regulations. I find that the Respondent violated Section 8(b)(1)(A) and (2) of the Act, as alleged.

Procedural History

This case began on January 17, 2003, when the Charging Party, Victor De La Fuente, filed his initial charge in this proceeding. On October 30, 2003, after investigation of the charge, the Regional Director for Region 16 of the National Labor Relations Board issued a Complaint and Notice of Hearing, which I will call the "Complaint." In issuing this complaint, the Regional Director acted on behalf of the General Counsel of the Board, whom I will refer to as the "General Counsel" or as the "government."

Respondent, International Brotherhood of Teamsters, Local Union No. 657, filed a timely Answer to the Complaint.

On January 14, 2004, a hearing in this matter opened before me in San Antonio, Texas. The parties presented evidence on January 14 and 15, 2004. On January 20, 2004, counsel gave oral argument. Today, January 21, 2004, I am issuing this bench decision.

Admitted Allegations

Respondent amended its Answer orally after the hearing opened. Based upon the admissions in Respondent's Answer, as amended, I find that the General Counsel has proven the allegations raised in Complaint paragraphs 1, 2, 3, 4, 5 and 8.

More specifically, I find that the Charging Party filed and served the unfair labor practice charge in this proceeding as alleged. Further, I find that Respondent is a labor organization within the meaning of Section 2(5) of the Act.

Additionally, I find that the Board appropriately may assert jurisdiction over Respondent because, during the 12 months preceding the issuance of the Complaint, employers engaged in commerce have recognized and entered into collective–bargaining relationships with Respondent in its capacity as the exclusive bargaining representative of their employees. In that regard, I find that at all times material to the Complaint, Texia Productions, Inc., a California corporation engaged in motion picture production, has met the Board's standards for assertion of jurisdiction and is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

Complaint paragraph 6 alleges that all material times, Frank Perkins held the position of Respondent's president and has been a supervisor of Respondent within the meaning of Section 2(11) and an agent of Respondent within the meaning of Section 2(13) of the Act. Respondent admits that Perkins is its president and its agent, but does not admit that he is a supervisor. Based on Respondent's admission, I find that Perkins is Respondent's president and agent.

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Additionally, based on Respondent's admission, I find that since about December 18, 2002, Respondent, by Frank Perkins, removed the Charging Party from the motion picture craft referral list and has failed and refused to register or refer him for employment as a craft member, as alleged in Complaint paragraph 8.

Contested Allegations

Complaint Paragraph 7 alleges as follows:

> Since on or about July 17, 2003, the Respondent has maintained an exclusive hiring hall for the movie craft and entered into an agreement with the Employer, and various other movie production companies, which provides the following: The Producer agrees to request referrals for all drivers required for work covered by the Agreement, from the Union.

Respondent has denied this allegation.

Although Respondent has admitted that since about December 18, 2002, it removed Charging Party from the movie craft membership and has failed and refused to register or refer him for employment, it has denied that it did so because of Charging Party's dissident intraunion activities or for reasons other than failure to tender the periodic dues and initiation fees uniformly required for membership, as alleged in Complaint paragraph 9.

Further, Respondent has denied that its removal of Charging Party from the movie craft membership list (referral list) and its failure and refusal to register or refer him violate Section 8(b)(1)(A) and (2) of the Act, as alleged in Complaint paragraphs 10 and 11, respectively. I will address these issues in the order they appear in the Complaint.

Does Respondent Operate An Exclusive Hiring Hall?

When California motion picture producers film in the San Antonio area, they typically rent trucks and other vehicles and hire local drivers to operate them. Such producers have entered into a number of collective–bargaining agreements with Respondent, and use Respondent's referral service as a source of employees. In the past, motion picture producers have requested employees often enough that Respondent has a separate list of drivers to be referred to such productions. The drivers on this list comprise the "motion picture craft."

On January 1, 2000, Respondent entered into a collective–bargaining agreement with MPC Productions, LLC, which filmed part of the movie "Miss Congeniality" in the San Antonio area. This contract typifies the collective–bargaining agreements between Respondent and motion picture producers. Article VI of this agreement states as follows:

> Employment
>
> (a) The parties hereto recognize the conditions in this industry require the frequent hiring of drivers on a daily non–continuing basis. For this purpose, the Union shall

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maintain, for the convenience of the Producer and the employee, a referral service which shall in all respects comply with all applicable provisions of law.

(b) The Producer agrees to request referrals for all drivers required for work covered by the Agreement, from the Union. This provision is subject to the following conditions:

(i) Chauffeurs will be referred to the Producer from the Union on a non–discriminatory basis, and such referrals will in no way be affected by Union membership or any aspect thereof.

(ii) The Producer retains the right to reject any applicant referred from the Union.

There is an issue concerning how closely the parties follow these terms in practice. Respondent contends that in practice, employers obtain a significant number of drivers from other sources and that, accordingly, its hiring hall cannot be considered "exclusive."

Film crews lease some vehicles which are specialized, complicated and quite expensive. For example, one truck with electrical generators costs $325,000. The lessor of such a vehicle commonly wants it to be operated by an experienced driver whom the lessor knows and trusts. Commonly, the film producer will not ask for the Union to refer a driver for this specialized vehicle but instead will hire the driver designated by the lessor.

Other specialized needs may result in a producer hiring drivers without regard to their membership in the Respondent's "motion picture craft." For example, during the filming of "The Alamo," the producer needed some drivers with special qualifications, such as a license to haul hazardous materials. Filming of this motion picture took more than 100 days and for 3 of those days, the producer employed up to 60 drivers, including 8 to 10 not referred by the Respondent.

Respondent argues that its referral system cannot be considered an exclusive hiring hall because a motion picture producer can hire a number of such specialized drivers who are not on Respondent's "motion picture craft" list. Respondent also points to its internal rules governing operation of its referral service. These "Craft Rules for Pipeline, Movies and Convention" state, in part, "Movie producers can special request 10 percent of the drivers on any show, however, this request must be in writing."

This rule, however, must be considered in the context of the other rules surrounding it. These rules state, in part, as follows:

A. Teamsters Local Union No. 657 has jurisdiction over different crafts including pipeline, movies and convention.

B. Each of these industries is considered a craft. The Local Union maintains a list of the regular craft members.

C. Craft members who are in movie, pipeline and convention prior to January 1, 1995 will be considered the A–List for those crafts. The A–list members will

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be referred first. If the craft A–list is exhausted, extra members will be referred from the Local 657 call list.

* * *

G. Movie A–list craft members will be referred on a work–time rotational basis. The Local Union will acquire the call sheets from the production company and will keep track of how many weeks each member has worked. The member with the least amount of weeks worked will be the next referred as long as he or she is qualified and available to perform the work.

H. Movie producers can special request 10% of the drivers on any show, however, this request must be in writing.

* * *

J. If the work load justifies adding additional members to a craft list, they will be drawn from the Local 657 call list by order of who has performed the most work in that craft.

K. Referrals by the Local Union are made on a nondiscriminatory basis and are not based on or in any way affected by race, sex, age, national origin, disability, religion, or lawful union–related activity.

Taken as a whole, these rules do not relieve an employer which signed the collective–bargaining agreement from the obligation to "request referrals for *all* drivers required for work covered by the Agreement, from the Union." (Emphasis added) Rather, the Respondent's internal rules simply specify how it will select the drivers to be referred.

For example, Rule H provides that "producers can special request 10% of the drivers on any show, however, this request must be in writing." This rule does not eliminate the requirement that a signatory employer must come to the Union for referrals but instead reaffirms that requirement. Even when such an employer wants to hire a particular driver with unusual qualifications or experience, the rule doesn't free the employer to approach that driver directly and hire him without going through the Union. To the contrary, the employer must present such a request to Respondent and, in fact, do so in writing.

Under its internal rules, the Union maintains two separate lists of "members" who can be referred. Those on the "A–List" have previous experience working for motion picture producers and they take priority. However, the rules still allow the Union to refer members on the more general call list under certain circumstances.

The record certainly indicates that movie producers employed some drivers who were not on the "A–List," that is, the list of drivers in the "motion picture craft." However, persuasive evidence does not establish that producers simply bypassed the Union and hired the drivers without the Union's knowledge or consent.

The General Counsel bears the burden of proving that Respondent operated an exclusive hiring hall. On its face, the language in the collective–bargaining agreement creates such an exclusive referral system and, in the absence of contrary evidence, the contractual language is sufficient to carry the government's burden of proof.

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Respondent's evidence does not establish that in practice, the parties simply ignored this contract term. It certainly would not be in the Respondent's interest to turn a blind eye to instances in which an employer violated this provision. Absent persuasive evidence that Respondent countenanced violations of its referral clause, I will not simply assume that after winning such a significant agreement, Respondent failed to enforce it. The present record does not provide such persuasive evidence.

Ironically, the General Counsel and the Charging Party did present evidence raising a question about how diligently Respondent maintained the exclusive hiring agreement. Indeed, the Charging Party's protected activity consisted, in part, of protests that the Union officers were failing to hold employers to the exclusive hiring hall agreement.

Most notably, at a membership meeting in December 2002, the Charging Party told Respondent's president, Frank Perkins, "to get off his dead ass and start enforcing the rules." The General Counsel argues that this statement, made in front of the Union membership, culminated Charging Party's long history of criticizing the Union leadership and precipitated the discrimination against him.

Although the Charging Party's statement to the Union president constitutes protected activity, it would not be appropriate to consider it for the truth of the matter asserted. As an out–of–court declaration, it constitutes hearsay if offered for that purpose.

Additionally, I have some concerns about the reliability of the Charging Party's testimony. Often, he did not respond to the specific question asked, but instead gave a long rambling answer which mixed his opinions with his recollection of facts. This tendency detracted from the weight accorded to this testimony.

Additionally, the Charging Party's recollection may have been affected by a bias against the current Union officers. The Charging Party previously had been Respondent's secretary–treasurer, but lost in 1994 to Frank Perkins, who is now Respondent's president. Additionally, when the Charging Party lost this elective position, he also lost his staff position as business agent, which Perkins then assumed.

Partisan feelings, if not bitterness, may have colored his opinions about the current Union leadership, headed by Perkins, and its effectiveness enforcing the collective–bargaining agreement. Indeed, the emphatic tone of Charging Party's December 2002 statement to Perkins – that Perkins should "get off his dead ass" and begin enforcing the Union rules better – is consistent with such hard feelings.

Other witnesses corroborate that the Charging Party made the "get off his dead ass" statement during the Union meeting, and Respondent has admitted removing the Charging Party's name from the "motion picture craft" list. Therefore, I find that these events took place. On the other hand, I view Charging Party's opinions about the operation of Respondent's hiring hall to be merely that, opinions, which should not be accorded the status of fact.

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In sum, I conclude that credible evidence does not support a finding that Union officials allowed the contractual referral system to be ignored or that motion picture producers frequently bypassed it.

In *Development Consultants*, 300 NLRB 479 (1990), an employer and a union had entered into a collective–bargaining agreement providing that the "local union having jurisdiction shall be recognized as the principal source of laborers and shall be given the first opportunity to refer qualified applicants for employment." The Board held that this clause did not establish an exclusive hiring hall because it could be interpreted to require only that the local union be given the first opportunity to refer applicants.

By comparison, the contractual language in the present case states that the signatory employer agrees "to request referrals for *all* drivers required for work covered by the Agreement, from the Union." (Emphasis added) The word "all" leaves no alternative. Other contractual language certainly gave an employer the right to refuse to hire an applicant referred by the Respondent but the provision did not state that an employer, having rejected an applicant, could then bypass the Respondent and fill the position by hiring from another source. To the contrary, it seems clear that Respondent would then refer the employer another driver.

In these circumstances, I conclude that Respondent did operate an exclusive hiring hall, as alleged in Complaint paragraph 7.

8(b)(1)(A) and 8(b)(2) Allegations

The Charging Party has been a member of Respondent since 1975 or 1976. From 1982 to the end of 1994, Charging Party served as one of Respondent's business agents. Also, from 1991 to 1994, he held the elective office of Respondent's secretary–treasurer. The current Union president, Frank Perkins, defeated the Charging Party in a 1994 election and assumed the office of business representative.

In late December 1994 or very early in 1995, the incoming Union president, Richard Glasebrook, told the Charging Party that he could no longer be a business agent, even though the Charging Party had expressed interest in continuing in this position. The Charging Party then asked to be put on the "motion picture craft" list, and Glasebrook agreed.

It appears that Glasebrook put the Charging Party on this "movie list" as a kind of consolation, because the Charging Party would no longer be either secretary/treasurer or business agent. During his testimony, Glasebrook explained that it didn't cost the Union any money to put the Charging Party on the "motion picture craft" list and that he took this action to reduce hurt feelings after the election. "I felt like in the spirit of union brotherhood," Glasebrook testified, "it was best for me to extend an olive branch and to try to heal the wounds of the election. . ."

According to Glasebrook, he then decided that enough people were on the "motion picture craft" list and closed this list, meaning that no one else could get on it. Although

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Glasebrook closed the list early in 1995, shortly after he took office, he did not embody the action in a formal Union rule until 1997.

"I had already made a commitment to Victor [De La Fuente] to put him in," Glasebrook testified, but he couldn't put others on the list. Instead, he told everyone else that the "motion picture craft" list was closed. Based on my observations of the witnesses, I credit Glasebrook's testimony.

The Charging Party testimony about this matter generally accords with Glasebrook's, except that the Charging Party suggests that it was Glasebrook's idea to put him on the "motion picture craft" list. The Charging Party testified that he expressed his appreciation to Glasebrook by explaining that the company for which he used to work, before becoming a business agent, was no longer in business and he needed employment.

The Charging Party received his first referral to a motion picture producer in late 1995 or early 1996. After that, the Charging Party continued to receive referrals to motion picture producers.

In January 1997, the Charging Party attended a Union meeting at which President Glasebrook distributed Union rules concerning Respondent's referral system. (These are the rules excerpted above in discussing whether Respondent operated an exclusive hiring hall.)

In addition to the Charging Party and Respondent's President Glasebrook, Vice President Albert Martinez, Secretary–Treasurer Perkins, and from 40 to 50 Union members attended this meeting. According to the Charging Party, one of the members raised his hand to speak and then referred to the following rule:

> C. Craft members who are in movie, pipeline and convention prior to January 1, 1995 will be considered the A–List for those crafts. The A–list members will be referred first. If the craft A–list is exhausted, extra members will be referred from the Local 657 call list.

The member then said, "According to this rule, Victor De La Fuente is not qualified to be considered [an] A–list craft member." The Charging Party testified that Union President Glasebrook replied that he had excepted De La Fuente from the rule in 1994.

Glasebrook's testimony generally corroborates De La Fuente's account. Glasebrook recalled members questioning him about the Charging Party's inclusion in the "motion picture craft." However, Glasebrook did not recall at exactly which meeting this subject came up.

"I explained to them that I had made a commitment to Victor [De La Fuente] at the time that I came into office," Glasebrook testified, "and that I kept that commitment and that I'd made that commitment far in advance of writing up the rules or even having an idea of what I would put down for rules and that I did it in my authority as the president of the local and that I had the authority to do that."

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Charging Party's Protected Activities

As more and more producers began filming in Texas, the Charging Party received an increasing number of referrals. However, he began to dislike certain aspects of the referral system.

For example, the Charging Party objected to the amount of power the producers and transportation coordinators working for the producers were exercising in selecting the Union members referred. De La Fuente began speaking out at Union meetings, protesting that the work was "not being distributed in a fair and equal basis."

The Charging Party testified that a transportation coordinator would call him directly and offer him work, and when that happened, De La Fuente would telephone the Union to make sure he was next on the list. "I've been told," he said, "that if they call you, you're next."

De La Fuente further testified that when he checked, he would discover that some of the drivers working on a production were not on the Union's motion picture craft list, and "on several occasions, we find people that. . .were not even Union members and they were working ahead of some of the craft members."

The Charging Party's complaints pertained to the job referral provision of the collective–bargaining agreement and involved matters of common concern to many other Union members. On that basis alone, I would conclude that the Act protected this activity.

Additionally, two other witnesses gave testimony indicating that the Charging Party was acting not merely for himself but for other Union members. Union member Archie Carillo testified that De La Fuente was trying to get Union official Perkins to "check on the complaints that we had." Carillo's use of the word "we" clearly signifies that the Charging Party was not acting solely on his own behalf.

Union Member Albert Martinez testified that the Charging Party was a job steward in the movie craft and that Union members would bring problems to him. Based on all of this testimony, I conclude that De La Fuente's complaints enjoyed the protection of the Act.

The Charging Party was not satisfied with the answers he received when he complained to Union officials, so he began to raise his complaints in Union meetings, when other members were present. The General Counsel points particularly to the Charging Party's comments at a December 8, 2002 membership meeting, arguing that these statements in particular precipitated his removal from the "motion picture craft" list.

The Charging Party estimated that between 35 and 50 Union members attended this meeting. Some members had reported to De La Fuente that they had seen drivers who were not in the "motion picture craft," and perhaps not even Union members, working on motion picture productions. The Charging Party raised these complaints during the meeting.

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De La Fuente raised his hand and got the floor. He described the reports that drivers not on the list were working at movie sites. According to the Charging Party, Perkins replied that he was unaware of this problem and requested that the Charging Party give him the names of some of these drivers.

The Charging Party responded by asking Perkins to explain why he was unaware that nonlist people were working, and, De La Fuente testified, Perkins repeated his request for names. The Charging Party told Perkins that he thought it should be part of Perkins' job to pick up the phone and find out who was working. The record suggests that as this interchange continued, it became heated.

Finally, the Charging Party stated to Perkins that "I think what you need to do, you need to get off your dead ass and go and do the job and find out what's going on so that you know that the rules are not being followed."

Perkins made a reference to trouble but there is some controversy over whether Perkins called De La Fuente a "troublemaker" or simply said that he was "looking for trouble." Both Albert Martinez and Archie Carrillo corroborated that Perkins called De La Fuente a "troublemaker."

Based on my observations of the witnesses, I believe that the testimony of Martinez is reliable. Martinez not only quoted Perkins as calling De La Fuente a "troublemaker," but specifically stuck to that testimony on cross–examination. I find that Perkins did call De La Fuente a "troublemaker."

What Happened to Charging Party

On December 18, 2002, the Union sent the Charging Party a letter signed by Frank Perkins in his capacity as President and Business manager. The letter stated as follows:

> After review of the Local Union rules and in an effort to make sure the Local Union is following them as you requested, we have found a couple of corrections that need to be changed.
>
> *Rule E* clearly and specifically states to be considered a craft member you must have been employed in that industry prior to January 1, 1995. As you are aware and as it is well documented you were employed by Teamsters Local Union #657 as a Business Agent until December 31, 1994 the last day you would have had to be employed in the motion picture industry to be considered a craft member according to the rules.
>
> In order to comply with *Rule E*, you do not meet the requirements to be considered a craft member. Therefore, your name has been removed. If you would like for me to recommend you for hire at one of the company's we represent, I will be more than happy to do so. Please note that I cannot make the employer hire you, but I can recommend you.

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Although you have made it very clear that you have a copy of the rules, I have enclosed a copy for your convenience.

Framework for Analysis

The General Counsel and Charging Party argue that Respondent removed De La Fuente from the referral list in retaliation for his protected activities. Respondent, however, contends that it was merely enforcing the existing rule, under which De la Fuente did not qualify to be on the list.

As the General Counsel noted in oral argument, in a mixed motive case involving a Union respondent, it is appropriate to use the framework articulated by the Board in ***Wright Line***, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). See ***Teamsters Local 287 (Consolidated Freightways)***, 300 NLRB 539, 548 fn. 20 (1990); ***Operating Engineers Local 77 (Potts & Callahan),*** 298 NLRB 8, 10 fn. 4 (1990).

Arguably, the present case might be viewed as a mixed motive case but I believe it more comfortably fits with other cases in which the respondent's asserted reasons may or may not be pretextual. In other words, the present case appears to be more of an "either/or" choice and I will analyze it from that perspective. However, I would reach the same result were I to treat the case as a mixed motive one and apply the ***Wright Line*** framework.

Analysis

Clearly, the Charging Party was a member of the "motion picture craft" from January 1995 forward until being removed from that status in December 2002. Whether or not he deserved to be included in the craft is irrelevant. A Union official had placed him in the craft, and for a number of years the Union treated him as being a member of the craft.

It may not be entirely appropriate to speak in terms of his status "vesting" and I hesitate to use that word, but somewhere along the line, as De La Fuente kept receiving and accepting referrals to motion picture producers, his status as a member of the craft became, for our purposes, incontestable. Therefore, I reject the defense that removing De La Fuente from the list was merely a "correction" of the Union's previous mistake.

The simple fact is that De La Fuente had been receiving referrals and then suddenly, because of the Union's action, he no longer received referrals.

In his testimony, Perkins described himself as "passionate" about running the hiring hall. It is clear that Perkins, who is the Respondent's top official, became rankled by De La Fuente's persistent and escalating criticism of how he, Perkins, was doing his job.

During Perkins testimony, when he described a particular encounter with the Charging Party, his voice got louder, signifying to me that Perkins was even a little upset with De La Fuente at the time of the hearing. This upset clearly sprang from the Charging Party's protected

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activities. Thus, after De La Fuente criticized Perkins for the way he was doing his job, and told him to "get off his dead ass," Perkins called the Charging Party a "troublemaker."

This comment, along with the timing of the Union's action, provides evidence of unlawful animus. The tone of the Union's subsequent letter to De La Fuente does nothing to dispel such animus.

I find that the Union, by Perkins, took the action against De La Fuente because he had engaged in the protected activity of criticizing the way Perkins was doing his job as a Union official. Such criticism was protected and does not lose the protection of the Act merely because expressed in vulgar words. The record makes clear that Union meetings were not as polite as Sunday school picnics.

Further, I find that Respondent had no other reason for taking the action against Charging Party. The record does contain some testimony that at least one employer was dissatisfied with De la Fuente's work, but there is no evidence that this employer complained to the Union or that the Union was acting on such a complaint at the time it removed De La Fuente from the list.

Inasmuch as I have concluded that the Union operates an exclusive hiring hall, I further conclude that Respondent's action violated Section 8(b)(2) of the Act.

Additionally, I conclude that Respondent violated Section 8(b)(1)(A) of the Act. This conclusion does not depend on the exclusive nature of the hiring hall. As the Board stated in ***Local Union No. 626, United Brotherhood of Carpenters & Joiners of America, AFL–CIO (Strawbridge & Clothier)***, 310 NLRB 500, fn. 2 (1993), even without an exclusive hiring hall arrangement, a union violates Section 8(b)(1)(A) where it discriminates against members in retaliation for their protected activities. The credited evidence establishes precisely such a violation.

When the transcript of this proceeding has been prepared, I will issue a Certification which attaches as an appendix the portion of the transcript reporting this bench decision. This Certification also will include provisions relating to the Findings of Fact, Conclusions of Law, Remedy, Order and Notice. When that Certification is served upon the parties, the time period for filing an appeal will begin to run.

The hearing is closed.

APPENDIX B

NOTICE TO MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the Federal labor law and has ordered us to post and abide by this Notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, assist a union
Choose representatives to bargain on your behalf with your employer
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT remove the name of any job applicant from any craft referral list because that person criticized union officers or otherwise engaged in dissident intraunion activity protected by the National Labor Relations Act.

WE WILL NOT refuse to register for referral, or to refer for employment, any job applicant because that person criticized union officers or otherwise engaged in dissident intraunion activity protected by the National Labor Relations Act.

WE WILL NOT in any like or related manner restrain or coerce job applicants in the exercise of rights guaranteed by the National Labor Relations Act or unlawfully cause an employer to discriminate against them.

WE WILL restore the name of Victor De La Fuente to our motion picture craft referral list.

WE WILL make Victor De La Fuente whole, with interest, for all losses he suffered because we removed his name from the motion picture craft referral list, refused to register him for referral, and refused to refer him.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS,
LOCAL UNION NO. 657 (TEXIA PRODUCTIONS, INC.)
(Labor Organization)

Dated: _____ By: _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret–ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

819 Taylor Street, Room 8A24, Fort Worth, TX 76102–6178

(817) 978–2921, Hours: 8:15 a.m. to 4:45 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (817) 978–2925.